UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

WAYNE R. PEACOCK, et al.,	***)***	
	)	
Plaintiffs	***)***	
	)	
v.	***)***	***Docket No. 99-189-P-H***
	)	
PETER J. CONNEEN, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON DEFENDANT CONNEEN'S MOTION FOR SUMMARY JUDGMENT ON COUNT I

Defendant Peter J. Conneen moves for summary judgment on Count I of the plaintiffs' complaint on the basis of the final sentence of 14 M.R.S.A. § 866, sometimes called the "borrowing statute." I recommend that the court deny the motion.

I. Summary Judgment Standard

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "A fact becomes material when it has the potential to affect the outcome of the suit." *Steinke v. Sungard Fin. Sys., Inc.*, 121 F.3d 763, 768 (1st Cir. 1997). "By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313,

315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The following undisputed facts are material to the issue raised by defendant Conneen's motion. This action arises out of an automobile accident that occurred on July 25, 1993 in Yarmouth, Maine. Defendant Peter Conneen's Statement of Undisputed Material Facts in Support of Motion for Summary Judgment ("Conneen's SMF") (Docket No. 7) ¶ 1; Plaintiffs' Response to Defendant Conneen's Statement of Undisputed Material Facts ("Plaintiffs' SMF") (Docket No. 11) ¶ 1. At the time of the accident, both plaintiff Wayne Peacock and Conneen were residents of Georgia. Conneen's SMF ¶¶ 2-3; Plaintiffs' SMF ¶¶ 2-3. On June 6, 1995 plaintiff Wayne Peacock sued Conneen in state court in Georgia, asserting claims arising out of the July 25, 1993 accident.

Conneen's SMF ¶ 4; Plaintiffs' SMF ¶ 4; Summons and Complaint, *Wayne R. Peacock v. Peter J. Conneen*, Civil Action No. 95VS0100037-B, State Court of Fulton County, Georgia, Items C and E in Defendant's Appendix to Statement of Undisputed Material Facts ("Conneen's Appendix"), filed with Conneen's SMF. Wayne Peacock unilaterally dismissed this action without prejudice on or about February 20, 1997. Conneen's SMF ¶ 6; Plaintiffs' SMF ¶ 6; Item E in Conneen's Appendix.

Defendant Gary J. Welsch, alleged by the complaint to have been the driver of the other vehicle involved in the July 25, 1993 accident, has been a resident of Maine from that date until the present. Complaint (Docket No. 1) ¶¶ 11-12; Affidavit of C. Donald Briggs, III (Docket No. 12) ¶ 4.[1] Defendant Alamo Rent-A-Car, alleged by the complaint to be the owner of the car operated by Conneen in which plaintiff Wayne Peacock was a passenger at the time of the accident, is a corporation with a place of business in Florida, duly authorized to do business in the state of Maine. Complaint ¶ 3; Defendant Alamo Rent-A-Car, Inc.'s Answer to Plaintiffs' Complaint (Docket No. 4) ¶ 3.

This action was filed on June 16, 1999. Docket.

III. Discussion

Conneen contends that Count I of the complaint, Wayne Peacock's claim against him, is barred by the final sentence of 14 M.R.S.A. § 866, which provides: "No action shall be brought by

[1] The affidavit of Attorney Briggs is made on information and belief, in violation of Fed. R. Civ. P. 56(e), which requires that affidavits submitted in connection with motions for summary judgment be made on personal knowledge. However, Conneen has not objected to the affidavit on this basis, so the court will nonetheless consider the undisputed information it supplies.

any person whose cause of action has been barred by the laws of any state, territory or country while all the parties have resided therein." The jurisdiction of this court over this action is based upon the diversity of the current residences of the parties, Complaint ¶ 6, and Maine's statutes of limitations control under these circumstances, *Lareau v. Page*, 39 F.3d 384, 387-88 (1st Cir. 1994).

Georgia, where Wayne Peacock brought his first action against Conneen, has a two-year statute of limitations for tort claims. Ga. Code Ann. § 9-3-33. Assuming *arguendo* that Wayne Peacock's cause of action against Conneen would have been barred in Georgia when it was asserted in this court in 1999, Maine's borrowing statute by its terms does not shorten the six-year limitations period otherwise applicable to Wayne Peacock's claim pursuant to 14 M.R.S.A. § 752 to the two-year period of the Georgia statute because the other two defendants named in this action were not residents of Georgia at any relevant time. While it is true that a plaintiff may avoid the impact of the last sentence of section 866 by suing additional defendants who are not, and were not at the relevant time, residents of the state whose shorter statute of limitations a given defendant might otherwise successfully invoke, and that the language of section 866 may thus apply only to a narrow class of claims, this court may not interpret the words "while all the parties have resided therein" to mean anything other than what they clearly say. *LaPlante v. American Honda Motor Co.*, 27 F.3d 731, 735 (1st Cir. 1994). The borrowing statute applies only when all of the parties to the Maine action resided in a different state while that state's statute of limitations applicable to the plaintiff's claims against all of the named defendants expired. That is not the case here. Maine's six-year statute of limitations is therefore applicable, and this action was timely brought.

Conneen's argument that this interpretation of section 866 is "not logical in light of the purpose of the borrowing statute," Defendant Peter Conneen's Reply Memorandum in Support of

Motion for Summary Judgment (Docket No. 15) at 1, 3-4, is a policy argument that should be addressed to the Maine legislature. This court is constrained to apply Maine statutory law as it is written.

IV. Conclusion

For the foregoing reasons, I recommend that defendant Conneen's motion for summary judgment be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 2nd day of November, 1999.

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David M. Cohen
United States Magistrate Judge